Office-Supreme Court, U.S.
FILED
MAR 19 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

POINT I

Abstention under the principles of *Younger* v. *Harris* is appropriate in this case.

Appellees raise two points in response to the Commission's abstention argument, both of which require a brief reply.

Appellees contend that the abstention argument should be rejected because it is not being presented in this Court by co-appellant New Jersey Department of Law and Public Safety, Division of Gaming Enforcement. However, the New Jersey Legislature has seen fit to create two state agencies to regulate casino gaming, and to provide for separate representation of each, *see*, N.J. Stat. Ann. 5:12-54(d) and -55 (West Supp. 1983), and the Casino Control Commission is pressing the abstention argument in this Court. Appellees contend that "[t]he Casino Commission has no interest in delaying . . . adjudication because its proceedings have been completed and therefore will not be interfered with by a decision here" (appellees' brief at 13). The Commission has never had and does not now have any interest in delaying adjudication. The Commission merely seeks vindication of the abstention argument it has maintained throughout this litigation. It is true that the Commission's adjudicatory hearing, as well as the investigatory and prosecutorial efforts of the Division of Gaming Enforcement, have been completed. However, the Commission has been enjoined from enforcing its remedial order, and thus it is the Commission's process which has been interfered with by the order of the Circuit Court and which would be interfered with by a decision on the merits by this Court.

Appellees' remaining argument is that abstention is inappropriate because their constitutional claims could not be resolved before the Commission. However, the state appellate courts were always available to appellees, on an interlocutory basis or on appeal of right from the Commission's final order, and appellees have in fact appealed to the Superior Court, Appellate Division from the final order and have raised the same constitutional claims presented to this Court. The state appellate courts are bound by the same constitution as the federal courts, and are obviously competent to hear and decide appellees' constitutional claims. *See, Allen* v. *McCurry,* 449 U.S. 90 (1980). The state appellate courts are also competent to grant any stay or other interim relief which may be necessary to preserve the status quo pending appeal. *Cf. Middlesex County Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423, 430, n.15 (1982).

The New Jersey Court Rules provide that on or after the filing of a notice of appeal, or notice of motion for leave to file an interlocutory appeal, from a decision of an administrative agency, a notice of motion for ad interim relief or a stay may be made to the Appellate Division. N.J. Ct. R. 2:9-7 (1984). The rules also provide that applications for temporary relief, stays and emergency orders may be made, with or without notice, to a Justice of the State Supreme Court if a matter is pending in the Appellate Division. N.J. Ct. R. 2:9-8 (1984). There is thus no substance to appellees' argument that absent a federal injunction they would be left without an avenue of interim relief from the Commission's order. For the reasons set forth in the Commission's main brief, the district court should have abstained and allowed the state proceedings to complete their orderly course, including appellees' appeal as of right to the state courts from any adverse agency determination. *See,* N.J. Stat. Ann. 5:12-110 (West Supp. 1983); *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975).

POINT II

Bus Employees v. _Wisconsin Board_ is inapposite to the present matter and utterly fails to support the conclusion that section 93 of the Casino Control Act is preempted by section 7 of the NLRA.

On the issue of preemption, this reply brief will only address the arguments raised in Point II C of appellees' brief, premised on *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951). All other arguments advanced by appellees regarding preemption have been dealt with in the Commission's principal brief.

Wisconsin Board involved a state statute which declared it to be a misdemeanor for any employee of a public utility to engage in a strike or to instigate, induce or encourage a strike. The statute further provided that whenever there was a collective bargaining "impasse" the Wisconsin Employment Relations Board was to select arbiters to "hear and decide" the dispute. 340 U.S. at 387-388. *Wisconsin Board* arrived in this Court on *certiorari* to the State Supreme Court, which had upheld *ex parte* orders of lower state courts permanently enjoining declared strikes against the Milwaukee Electric Railway and Transport Company and the Milwaukee Gas Light Company.[1]

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[1] Even this brief recitation of the operative facts in *Wisconsin Board* demonstrates its fundamental differences from the instant matter. These differences will be detailed below. The Commission therefore feels no compulsion to respond to appellees' charge that the appellants could not differentiate the case and chose instead to "simply ignore that precedent despite the Court of Appeals' strong reliance thereon." (appellees' brief at 33). As will be apparent, the Commission chose rather to focus on pertinent law in its presentation to this Court.

This Court noted that it had previously held, in *International Union of United Auto Workers* v. *O'Brien*, 339 U.S. 454 (1950), that in enacting the NLRA Congress had guaranteed the right to strike and established procedures and limitations governing that right, and had thereby "occupied this field and closed it to state regulation." *See*, 340 U.S. at 390. The Court went on to hold that the Wisconsin statute before it was invalid, explaining:

> The utilities companies, the State of Wisconsin and the other states as *amici* stress the importance of gas and transit service to the local community and urge that predominantly local problems are best left to local governmental authority for solution. On the other hand, petitioners and the National Labor Relations Board, as *amicus*, argue that prohibition to strikes with reliance upon compulsory arbitration for ultimate solution of labor disputes destroys the free collective bargaining declared by Congress to be the bulwark of national labor policy. This, it is said, leads to more labor unrest and disruption of service than is now experienced under a system of free collective bargaining accompanied by the right to strike. The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by this Court. In our view, the questions are for legislative determination and have been resolved by Congress adversely to respondents. [340 U.S. at 397].

Appellees conclude from the above language of *Wisconsin Board* that the balancing test so carefully developed in such cases as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), and *Local 926* v. *Jones*, —— U.S. ——, 103

S. Ct. 1453 (1983), should be discarded in evaluating the constitutionality of section 93 of the Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), and that the compelling state interests which underly section 93 should be ignored. However, *Wisconsin Board* does not establish an exception to the *Garmon* balancing approach. As the *Garmon* Court itself said:

> When the exercise of state power over a particular area of activity threatened interference with clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. [Citing, *inter alia, Wisconsin Board.*] However, due regard for presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but a promotor of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citations Omitted]. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of power to act. [359 U.S. at 243-244].

In *Wisconsin Board,* and earlier in *O'Brien,* the Court had canvassed the language and legislative history of the NLRA, and concluded that Congress had left no room for state enactments limiting the right to strike. In *Wisconsin Board,* the Court also noted that Congress had itself expressly rejected a proposal to restrict that right as it applies to public utilities. 340 U.S. at 390-394. The Court was faced with a statute which completely eliminated the right to strike with regard to workers in public utilities

in Wisconsin and struck down the statute. *Wisconsin Board* is merely an example of a state legislating in an area which has been entirely occupied by Congress and enacting a statute which directly conflicts with national labor policy.

In contrast, in adopting section 93 of the Casino Control Act New Jersey did not enter a field in which Congress had left no room for state enactments and did not contradict national labor policy. As discussed in the Commission's principal brief, in enacting the disqualification criteria of section 504 of the LMRDA, and in approving the compact involved in *DeVeau,* Congress made clear that it was not occupying this field to the exclusion of state regulation. As also previously explained, in *DeVeau,* 363 U.S. at 152, this Court made clear that section 8 of the Waterfront Commission Act, Title 29, N.Y. Unconsol. Laws, Sec. 9933 (McKinney 1974), did not conflict with or seriously impede national labor policy as set forth in section 7 of NLRA, 29 U.S.C. 157 (1973), and the same conclusion must be reached with respect to section 93 of the Casino Control Act.

The principal point of appellees' argument is that preemption is mandated where there is a direct conflict between federal and state enactments. The Commission does not take issue with this assertion. Where Congress has guaranteed the right to engage in an activity, a state statute prohibiting that activity cannot stand. The Commission's point has always been that section 93 does not contradict federal labor policy as embodied in section 7. This is made clear, not by references to cases dealing with the right to strike, but by reference to legislative pronouncements (adoption of section 504 and approval of the compact involved in *DeVeau*) and judicial pronouncements (the *DeVeau* opinion) directly on point.

In fact, appellees themselves concede that section 504 of the LMRDA does not have preemptive effect (appellees' brief at 27), but nonetheless conclude that section 7 of the NLRA preempts section 93. However, the LMRDA was an amendatory readoption of the NLRA. Appellees apparently impute to Congress an intent, evidenced by its adoption of section 504, to allow state enactments establishing additional disqualification criteria for labor leaders, while at the same time precluding all such enactments by readopting section 7.

Appellees later argued (Appellees' brief at 34) that by adopting the LMRDA in 1959 Congress ratified the decision in *Hill* v. *Florida,* 325 U.S. 536 (1945), a decision which appellees interpret as precluding any state legislation which applies qualification criteria to labor union officials. Again, appellees are contending that Congress adopted section 504 as a non-preemptive provision of the LMRDA, thus allowing for state enactments in this area, and at the same time ratified *Hill,* thus precluding all such enactments. In dealing with what they contend is a cohesive national labor policy, it is remarkable that appellees impute such schizophrenic motives to Congress.

Clearly, by enacting the disqualification criteria of section 504, and choosing not to give preemptive effect to that section, Congress allowed for state enactments in the area. On the other hand, some state enactments may well be so broadly and unnecessarily intrusive upon the right to choose representatives that they should be stricken in deference to section 7. However, it is at least manifest that state statutes of this type are not to be discarded based on an absolutist concept of the right to choose representatives, but must be examined on a particularized basis which balances any incidental strictures on the right against the purported state interest. It is difficult to imagine a more circumscribed and justified example of

such a statute than section 93. As Judge Becker said in his dissent below, it is a rare case in which a state statute disqualifying labor leaders can stand, but the present case, like *DeVeau,* is such a case. In any event, the majority of the Circuit Court surely erred in rejecting the statute out of hand, just as appellees now urge this Court to do.

One final point which requires a brief reply is appellees' attack on the section 93 remedy relating to the prohibition of dues collection. It is clear, and the Commission has ruled (A208a-A216a), that the only purpose of section 93 is to remove disqualified individuals from positions of authority within casino industry labor unions. The dues-prohibition remedy is merely a means to that end. The primary issue before this Court is whether section 7 of the NLRA precludes New Jersey from pursuing that end. If the Commission is correct in arguing that New Jersey can disqualify certain casino industry union leaders, the separate issue of the propriety of the dues-collection remedy arises. In *International Longshoremen Assoc.* v. *Waterfront Commission,* 642 F.2d 666, 670-671 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981), the Court noted that the plaintiffs in *DeVeau* had challenged the propriety of the dues-prohibition remedy in section 8 of the Waterfront Commission Act and that this Court, in affirming the dismissal of the complaint, "had necessarily upheld, against a claim of preemption, the validity of the dues-collection prohibition." The *International Longshoremen's* Court went on to uphold the dues-collection remedy against a First Amendment challenge, but that issue is not now before this Court. At any rate, the Commission respectfully submits that the dues-collection prohibition is a reasonable and necessary means of achieving the statutory purpose

of section 93, and that this remedial provision should once again be upheld.

Respectfully submitted,

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